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A New Threat: The National Security Risk of Third Party Litigation Funding

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The lack of safeguards in third party litigation funding provides a clear path for foreign adversaries to undermine U.S. national economic and security interests through the infiltration of the American litigation system.

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Executive Summary

There is growing concern that a large volume of foreign-sourced money may be pouring into U.S. civil litigation against U.S. companies and industries (including those in defense and other highly sensitive sectors) through third party litigation funding (TPLF), raising significant national and economic security risks.

TPLF is a rapidly expanding and pervasive business model in which third parties pay money to a litigant or his or her counsel in a lawsuit in exchange for a contingent interest in any proceeds from the litigation. While TPLF usage has increased substantially and seeped into virtually every facet of U.S. civil litigation in recent years, many courts are unaware of this phenomenon, largely because TPLF arrangements need not be disclosed and are rarely revealed to the court in a particular case.[1] The growth of TPLF poses significant threats to the U.S. civil justice system by increasing the filing of questionable claims, violating state champerty and maintenance laws, deterring and prolonging settlement efforts, contravening longstanding ethical rules for attorney conduct, and compromising the sanctity of the attorney-client relationship.

While these threats have been documented and discussed, one of the most serious risks generated by TPLF has gone largely underexplored: the possibility that foreign adversaries of the United States may undermine U.S. national economic and security interests through the infiltration of the American litigation system. A leading academic expert on TPLF specifically recognized this risk, warning "that the China Investment Corporation (CIC), China's Sovereign Wealth Fund, [could] fund[] a suit against an American company in a sensitive industry such as military technology" and, in the process, "obtain[] highly confidential documents containing proprietary information regarding sensitive technologies from the American defendant-corporation."[2] Although the extent of foreign TPLF investment in U.S. litigation remains largely unknown due

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to the current lack of TPLF transparency (which is itself a national security concern), the limited information available suggests that non-U.S. citizens, including sovereign wealth funds, are in fact participating in the U.S. TPLF market.

These foreign actors could attempt to exploit the American litigation system via TPLF in one of several ways. A foreign government, for instance, could seek to exert control over the strategy and outcome of a U.S. civil dispute by manipulating common provisions of litigation funding agreements that permit control or influence over the litigation. These clauses range from requiring funder consent for the hiring of counsel and experts to provisions giving funders the right to attend strategy meetings and participate in settlement negotiations.

Beyond directly controlling a case, a foreign adversary could encourage and exploit commercial disputes involving U.S. companies to advance their national interests in a variety of ways. For example, such disputes could advantage their home industries. These disputes, even if not successful, could cost U.S. companies substantial sums and damage their reputations, advancing the interests of the foreign adversary or its home industries. The foreign adversary could also use litigation funding to gain access to sensitive or otherwise unavailable information related to either of the litigants. Finally, a foreign adversary could fund litigation focused on divisive issues to influence domestic U.S. politics in a way that advances its strategic interests.

Due to the opacity of the litigation funding market, it is not possible to know whether, and to what extent, non-U.S. persons or entities may be exploiting the TPLF industry for nefarious reasons. However, given that non-U.S. citizens and foreign sovereign wealth funds are participating in the U.S. TPLF market, there is a serious risk that such foreign investment may be harming U.S. national security interests or is, at a minimum, threatening to do so. The good news is that there are judicial, executive, and legislative solutions for mitigating this risk. These include requiring the disclosure of TPLF and any foreign parties behind such arrangements and requiring U.S. persons acting as agents of foreign parties in TPLF arrangements to register with the U.S. government.

This paper first provides a brief background of TPLF, including its rapid growth in the U.S. It then describes how funders exercise control or influence over the litigation they finance, as reflected by the multiple funding arrangements that have come to light over the last decade. Next, the paper explains the potential national security risks for cases involving certain foreign investors, and finally, proposes various judicial, legislative, and executive solutions to minimize these risks.

Introduction

TPLF is the practice of a non-party to a dispute providing money to a party in connection with the party's pursuit of a potential or pending lawsuit.[3] The focus of this paper is on investment or portfolio financing, which includes investments in large-scale tort and commercial cases and alternative dispute resolution proceedings.[4]

Investors in this type of TPLF include hedge funds, private equity firms, endowments, family offices, and even sovereign wealth funds, "attracted by excess returns that are largely uncorrelated with macroeconomic risks."[5] The key feature of TPLF is that its repayment is tied to the outcome of a particular lawsuit or portfolio of litigation.[6] If the lawsuit that is the source of the funder's recovery is not successful, the investor receives nothing. But the more money the plaintiff wins or settles for, the higher the funder's recovery.

TPLF first emerged in Australia and some European countries as a supposed means of making courts more accessible to potential litigants who could not afford to finance their own lawsuits.[7] But that justification—which is dubious enough abroad—is even more so in the U.S. because our legal system already has relatively low financial barriers for someone to file a lawsuit, regardless of real merit. The U.S. judicial system has long allowed plaintiffs who cannot (or do not want to) self-finance a suit to enter into contingency-fee arrangements with their attorneys. That approach—which is not permitted in most other legal systems—encourages the filing of many lawsuits that would never be brought in other countries. A plaintiff in the U.S. can generally file a lawsuit without having to shoulder litigation costs, as long as some lawyer agrees that the case is worthy of his or her time.

TPLF: Entrenched and Invisible

Nonetheless, TPLF has not only made its way to the U.S., but the practice has become increasingly ubiquitous here, having "grown by leaps and bounds in the past decade."[8] Although it is impossible to measure the precise dollar amount invested yearly in U.S. litigation, one recent article estimated this figure to be around $2.5 billion, while another source put it at $5 billion.[9] A 2020 Swiss Re Institute report estimated that the amount was even higher, noting that the U.S. is the world's largest TPLF market and accounted for more than half (52 percent) of the $17 billion investment into litigation funding globally in 2020.[10] The same report also projects that global

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TPLF investment is expected to continue to grow steadily and estimates that annual investment could reach $31 billion by 2028.[11]

Although the largest litigation funder, Burford Capital (which is publicly traded on the New York Stock Exchange and operates extensively in the U.S.), experienced the first "accounting loss" in its history last year—which it attributed to slower case progress due to the pandemic—it reported $1.1 billion in new commitments and $841 million in cash deployment, both up significantly from 2020.[12] And the funder more recently reported that the first half of 2022 saw a 31 percent increase in consolidated capital provision income.[13] In short, "[l]awsuit finance is no longer in its infancy in the United States"[14]; rather, it is an entrenched feature of the country's litigation system.

The Evolving Business Model

Not only has the amount of TPLF money invested in U.S. litigation grown dramatically, but firms have also been diversifying the strategies and types of funding arrangements they employ. Litigation funding originated as third-party investment in a single case or legal action. However, "[o]ver the past three or so years, litigation finance firms have refocused from providing third-party financing to plaintiffs for single cases to financing portfolios of cases and providing the financing directly to law firms."[15] Under this approach, the funder essentially bankrolls all or part of a law firm's operations, including the firm's day-to-day operating expenses, and then takes a cut of any proceeds. By spreading financing across multiple cases, funders hope to make their investments less risky: "In a sector already [averse] to risk, a portfolio of cases could work much the same as mutual funds, helping to improve the chances of strong returns from multiple sources, rather than relying on just one piece of litigation."[16] However, as scholars have recognized, financing law firms through "fees derived from a portfolio of cases is, economically speaking, just a hair's breadth away from nonlawyer ownership of contingency firms whose main assets are their future fees."[17]

Portfolio funding is not the only novel TPLF funding model to develop in the past few years. Kyle Roche, of the law firm Roche Freedman, recently partnered with a cryptocurrency company, Ava Labs, to create Ryval, a crypto-based crowdfunding application intended to finance litigation.[18] The goal behind the platform was to "democratize" TPLF by allowing lay consumers to invest in so-called "vetted" lawsuits in exchange for a portion of any judgment or settlement proceeds.[19] However, according to recorded videos recently leaked by a whistleblower, Roche has boasted that the true purpose of his Ryval venture was "suing the company's competitors in the cryptocurrency and blockchain industries on behalf of class-action plaintiffs who weren't aware of their lawyers' true motives."[20] Roche explained that the class actions were used "as a means of obtaining privileged information on Ava labs' rivals," and "helped ensure that U.S. regulatory focus remained on these rivals."[21] While in this instance, it was domestic companies seeking competitor information to gain a strategic advantage over them and even potentially increase their regulatory exposure, there is nothing to suggest foreign actors would not do the same.

The dramatic growth and diversification of TPLF in the U.S. mean that in many federal civil lawsuits, outside investors hold legal rights to a portion of any proceeds from the lawsuit, not to mention some degree of control and access to confidential information. These non-parties include both U.S. and non-U.S. citizens,[22] family offices,[23] hedge funds, and foreign countries' sovereign wealth funds.[24] Non-party financial stakes potentially exist at all stages of civil litigation, in many federal courts, and in cases regarding a wide variety of subject matters. In particular, TPLF is frequently used in U.S. mass tort litigation (e.g., product-liability and false-advertising cases), securities fraud and data breach class actions, as well as contract disputes, patent and trademark infringement, antitrust, and insurance cases.[25]

However, the vast majority of courts remain unaware of this phenomenon, largely because TPLF arrangements need not be disclosed and therefore never end up being revealed to the court in a particular case.[26] The handful of exceptions are Wisconsin (which enacted a TPLF disclosure measure in 2018)[27]; the U.S. District Courts for the District of New Jersey (which recently adopted a local rule expressly requiring the disclosure of TPLF-related information at the outset of a case)[28] and the Northern District of California (which has adopted its own TPLF disclosure requirement for class actions); and certain individual judges[29] who have instituted standing rules requiring similar information in their own cases. These exceptions notwithstanding, the reality is that most judges have no idea whether TPLF is at play in litigation they are overseeing.

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Funder Authority to Control or Influence Litigation

TPLF undercuts a plaintiff's control over litigation because funders generally seek to protect their investment by exerting control over the plaintiff's strategic decisions. In some sense, the plaintiff can become a bystander in his or her own case, particularly where the investor and lawyer have a relationship involving multiple cases.

A recently released report by the American Bar Association's House of Delegates repeatedly recognizes and emphasizes the inherent risk of funder control, warning against such control over the litigation itself and over expenses associated with the lawsuit.[30]

Control and Influence in Single-Case Litigation Funding

TPLF companies frequently assert that they do not control litigation strategy.[31] However, that claim is belied by a 2017 "best practices" guide by IMF Bentham (now Omni Bridgeway, the second largest international litigation funder), which contemplates robust control by funders. Specifically, it notes the importance of setting forth specific terms in litigation funding agreements that address the extent to which the TPLF entity is permitted to: "[m]anage a litigant's litigation expenses"; "[r]eceive notice of and provide input on any settlement demand and/or offer, and any response"; and participate in settlement decisions.[32] Fundamentally, the few TPLF agreements that have come to light plainly demonstrate that, unsurprisingly, TPLF entities actually do exercise various forms of control and influence over the litigation matters in which they invest.[33]

Chevron-Ecuador

A prime example of substantial funder control was the elaborate funding agreement utilized by Burford in a lawsuit against Chevron Corporation in an Ecuadorian court, alleging environmental contamination in Lago Agrio, Ecuador. Burford invested $4 million with the plaintiffs' lawyers in the Lago Agrio suit in October/November 2010 in exchange for a percentage of any award to the plaintiffs.[34] The funding agreement at issue in that case "provide[d] control to the Funders" through the "installment of 'Nominated Lawyers'"—lawyers "selected by the Claimants with the Funder's approval."[35] The law firm of Patton Boggs LLP had been selected to serve in that capacity, and the execution of engagement agreements between the claimants and Patton Boggs, "a firm with close ties to the Funder, [was] a condition precedent to the funding."[36] "In addition to exerting control, it [was] clear that the Nominated Lawyers, who among other things control[led] the purse strings and serve[d] as monitors, supervise[d] the costs and course of the litigation."[37]

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White Lilly v. Balestriere

More recent examples show that other TPLF companies are employing litigation-control tactics like those set forth in Omni Bridgeway's 2017 best practices guide. For example, in *White Lilly, LLC v. Balestriere PLLC*, a TPLF company affirmatively asserted that it had the right to exercise control over litigation in which it had acquired an interest.[38] In its complaint, the TPLF company alleged that its funding agreement required that specified counsel, who had an existing relationship with the TPLF company, serve as one of the plaintiff's counsel in the funded lawsuit. Indeed, the TPLF entity alleged that its counsel breached her obligation to serve as the funder's "'ombudsman' to oversee the cases it ultimately invested in, and to ensure that the [lawsuits] asserted viable claims and were litigated properly and efficiently."[39] Further evidencing control, the TPLF entity asserted that it had been assured that the "proposed litigation" would settle "quickly."[40] The funding agreement also required that "[d]efendants obtain prior approval for expenses in excess of $5,000.00."[41] The import of these provisions was clear: the TPLF entity had ample means to control or influence the course of the litigation in which it invested.

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Boling v. Prospect Funding Holdings

Similarly, in *Boling v. Prospect Funding Holdings*, *LLC*, the U.S. Court of Appeals for the Sixth Circuit concluded that the terms of the funding agreements involved in that personal injury matter "effectively g[a]ve [the TPLF entity] substantial control over the litigation."[42] For example, two of the agreements permitted the funder to require the plaintiff to execute documents or pay filing fees to protect the funder's interest. Another agreement provided that "[i]f the Proceeds [from settlement] are insufficient to pay the [the funder] in full, [the funder] shall receive all of the Proceeds."[43] Such a provision undoubtedly influenced the plaintiff's ability to settle his case since he was required to accommodate the funder's flat fee, which accrued with interest.[44] And "[a]ll four Agreements limited [the plaintiff's] right to change attorneys without [the funder's] consent, otherwise [the plaintiff] would be required to repay [the funder] immediately."[45]

Gbarabe v. Chevron Corp.

Control provisions were also at play in the funding agreement in *Gbarabe v. Chevron Corp.*, a putative class action arising out of an explosion on an oil drilling rig off the coast of Nigeria.[46] The funding agreement contained a number of provisions allowing Therium, another TPLF company, to exercise control over the litigation. Specifically, the agreement referred to a "Project Plan" for the litigation developed by counsel and the funder with restrictions on counsel deviation, particularly with respect to hiring only identified experts.[47] The agreement expressly prohibited the lawyers from engaging any co-counsel or experts "without [the funder's] prior written consent."[48] Further, the agreement required that counsel "give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim."[49]

These kinds of provisions vest the funder with substantial control over key litigation decisions. Realistically, if a plaintiff's lawyer is being paid by the investor, it will be difficult to resist that pressure. Even when the TPLF provider's efforts to control a plaintiff's case are not overt, the existence of TPLF funding naturally subordinates the plaintiff's own interests in the resolution of the litigation to the interests of the TPLF investor. Accordingly, TPLF fundamentally changes how litigation decisions are made and threatens to reduce a justice system designed to advance the interests of the parties and to adjudicate cases on their merits to a litigation system effectively controlled by and in the service of third parties, who are interested solely in profit.

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Portfolio Litigation Funding

While the above examples all involved investments in a single action, the same concerns are only amplified in portfolio investing. As noted in the Introduction, portfolio funding is the practice of investors buying an interest in multiple cases being litigated by a particular law firm. Some have commented that "owning a right directly in the revenues from its portfolio of cases" is "only slightly different from investing in law firms as an entity."[50] Critically, these investment arrangements could even be called "ownership substitutes" and directly lead to "the same type of concerns that would arise from direct ownership," such as conflicts of interest, prioritization of profit-maximization, etc.[51] Indeed, the fact that portfolio funding results in greater investments in a law firm's cases or overall operations realistically increases a funder's leverage over the law firm it is bankrolling and heightens the risk that the attorneys responsible for those cases will subordinate the needs of individual clients in favor of the wishes of the firm's financier. This dynamic is exacerbated by the fact that "most litigation funders are repeat players,"[52] creating a perpetual cycle of investment and litigation decisions that are designed to maximize funders' return on investment rather than advance the best interests of the law firm's clients. In short, the closer the relationship between funders and law firms becomes, "funders' interests will probably exert more pull than those of the clients."[53]

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These concerns are not merely theoretical. Allegations surrounding the highly publicized bankruptcy of Girardi Keese, the firm founded by recently disbarred plaintiff's attorney Thomas Girardi, suggest that litigation funders may have been using portfolio-based funding to exert control or influence over Mr. Girardi's cases. According to a recently filed complaint by the Trustee appointed to manage the bankruptcy estate, Girardi and his law firm not only siphoned money from their clients but also allegedly did so with the knowledge and potentially the participation of litigation funders.[54] For more than 15 years, the litigation funders allegedly "refer[red] cases to Girardi Keese as a regular course of business for which they typically expected to receive 50% of the fees."[55] The allegations point to quintessential portfolio investments, with several funders purportedly bankrolling multiple cases in exchange for a piece of the attorneys' fees generated from those and other cases.[56] Far from alleging that these funders were passive investors, the complaint goes so far as to accuse the funders of taking over the law firm's cases and business operations.[57] Based on such alleged control over the law firm's cases and activities, the Trustee contends that the funders are "'implied in fact' partners of Girardi Keese, or, alternatively, that the [funders] are 'insiders' of Girardi Keese."[58] Although these allegations have not yet been proven, they demonstrate the potential for portfolio funding to lead to the same control and influence problems that previously plagued single-case litigation funding.

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National Security Threats Posed by Foreign Investment in U.S. Litigation

The secrecy surrounding TPLF and funding arrangements makes it impossible to know the precise source of much of the billions of dollars that are flowing into U.S. litigation pursuant to this practice. However, available information suggests that non-U.S. persons, including sovereign wealth funds, are participating in the U.S. TPLF market.[59]

Although much of this financing may be motivated solely by profit, foreign governments and companies, or their proxies, may exploit the lack of transparency in litigation financing to threaten U.S. national security. By investing in specific cases, in portfolios of cases, or through crowdfunded litigation financing, these governments or companies may seek to fund, encourage, and control U.S. litigation in a manner that harms U.S. companies in critical sectors, accesses sensitive information, or influences U.S. domestic politics.

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The Nature of the Threat

It is well-established by the U.S. government and various experts that U.S. adversaries such as China and Russia leverage the full scope of their political, economic, and military power to pursue their national security goals. The National Counterintelligence and Security Center has warned that "Russia and China operate globally, use all instruments of national power to target the United States, and have a broad range of sophisticated intelligence capabilities."[60] The Office of the Director of National Intelligence has echoed this concern, noting that China uses "whole-of-government efforts to spread [its] influence, undercut that of the United States, drive wedges between Washington and its allies and partners, and foster new international norms that favor the authoritarian Chinese system,"[61] and that "Russia presents one of the most serious foreign influence threats to the United States, using its intelligence services, proxies, and wide-ranging influence tools to try to divide Western alliances, and increase its sway around the world, while attempting to undermine U.S. global standing, amplify discord inside the United States, and influence U.S. voters and decision[-]making."[62]

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Given the concerted effort and enormous resources expended by foreign adversaries to pursue their national security goals, there is no reason to believe that exploiting litigation financing would be excluded from their toolbox. These governments, either directly or indirectly, may seek to exert control over the strategy and outcome of a case, or a portfolio of cases, by relying on the kinds of control provisions previously discussed in this paper. Because TPLF arrangements generally need not be disclosed, such funding or control would evade detection by either the defendant or the court overseeing the litigation. Indeed, foreign influence may not even be apparent to the plaintiff or his or her lawyers. Counsel may not know whether the source of funding in a given case is really just a proxy for a foreign adversary. As a result, the plaintiff's lawyers may be unwittingly acting as agents of a foreign power in pursuing a lawsuit in a U.S. court. While the ability of a third party to fund or direct the strategy of a case or portfolio of cases is problematic in and of itself, the risks are compounded when a foreign government is the one funding or exerting that control, particularly given that such influence would be completely unknown to the defendant, the court, or even the plaintiff and his or her lawyers.

Concerns around possible foreign interference in U.S. litigation through TPLF are potentially even more serious than those present in a purely commercial context, where the main objective of the investor is to make money. Unlike other investors in this space, a foreign government or company may not be seeking—or care about—a direct return in the form of a monetary award in any particular lawsuit. It may be perfectly willing to fund unsuccessful cases—potentially at great expense—where such litigation advances its political or economic interests or provides access to sensitive information.

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Moreover, a foreign actor need not even control the strategy of the case to achieve its objectives. Merely by funding and encouraging litigation in the United States or against key U.S. persons, entities, or even entire highly sensitive sectors, a foreign actor may be able to advance its interests regardless of outcome.

Draining Resources and Damaging Reputations of U.S. Companies

Foreign governments and companies—including those of U.S. adversaries such as China and Russia—may seek to encourage and exploit commercial disputes involving U.S. companies abroad or in the United States to destabilize key sectors of the U.S. economy or advance the interests of their home industries. A foreign government could take advantage of the opaque world of TPLF to finance or control lawsuits targeting the U.S. rivals of certain of its domestic industrial champions. Such lawsuits could be designed to tie up company resources, drag out litigation, or cause the company financial or reputational harm. Lawsuits alleging environmental or human rights abuses, even if devoid of any merit and regardless of their ultimate outcomes, could have the potential to discredit and undermine the commercial position of U.S. companies. These types of harassing lawsuits may cause long-term reputational damage, harming the ability of U.S. companies to receive government business (e.g., defense contracts), consequently diminishing the pool of domestic industries eligible for critical national security contracts. If pursued through a portfolio of lawsuits aimed at a whole group of similarly positioned U.S. companies, this strategy could drain the resources and destabilize entire sectors of the U.S. economy that are vital to American national and economic security. At the same time, by discrediting U.S. companies or disrupting their operations through burdensome litigation, a foreign government could enhance the competitive advantage of its industries in domestic and international markets.

The use of TPLF in the patent litigation context highlights the risks of this type of litigation model for U.S. security interests. As former U.S. Attorney General Michael Mukasey lamented,[63] this type of litigation does not advance the interests of inventors or consumers. Rather, it is commenced and prosecuted to generate revenue for investors, including foreign governments, with the added—or perhaps intended—effect of draining the time and resources of U.S. companies. Former U.S. Representative from Texas Dick Armey has also highlighted the ability of the “litigation finance

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industry to weaponize our patent system and further jeopardize our economic growth."[64]

Empirical data shows that the impact of patent litigation abuses on companies can be significant, reducing American research and development (R&D) and undermining the country's competitive advantage. A recent study showed that companies that lose abusive patent cases end up reducing R&D investment by an average of more than $160 million over the following two years as compared to companies that won such cases.[65] And given that approximately a quarter of all U.S. patent cases are financed by third parties,[66] it suggests that foreign governments, including through their sovereign wealth funds, could seek to exploit the TPLF system to accomplish this very objective by harassing and draining the resources of U.S. companies whether or not there is a genuine question about the validity of a patent.[67]

Accessing Sensitive Information

The U.S. government has recently highlighted the significant threat to U.S. technologies from foreign adversaries—particularly China, which has been described as "increasingly asserting itself by stealing our technology and intellectual property in an effort to erode United States economic and military superiority."[68] To counter this threat, the United States has put in place numerous, robust controls—including commercial and military export controls and the vetting of foreign investment in the United States—to limit the access of foreign adversaries to critical U.S. technology and information. Yet, foreign governments or companies could use litigation funding to circumvent these controls to gain access to sensitive or otherwise unavailable information related to either of the litigants.

As previously discussed, the limited TPLF arrangements that have become public demonstrate that funders have the right to offer their input in key litigation decisions, including the fundamental issue of settlement. Such authority necessarily implies that funders have the right to see the evidence upon which the plaintiff's lawyers are relying to prove their case, not to mention the materials

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produced in discovery by the other side. This type of risk was foreseen more than a decade ago by one of the leading academic authorities on TPLF:

> Finally, suppose that the China Investment Corporation (CIC), China's Sovereign Wealth Fund, funds a suit against an American company in a sensitive industry such as military technology. In the process of conducting due diligence prior to its investment in the litigation, as well as in connection with its ongoing monitoring of the litigation in which it now has a legal stake, CIC obtains highly confidential documents containing proprietary information regarding sensitive technologies from the American defendant-corporation.[69]

Notably, there is evidence that disreputable domestic actors have attempted to exploit the litigation funding system to gain access to sensitive information in this manner. As noted above, Kyle Roche, a co-creator of Ryval, a crypto-based litigation crowdfunding application, reportedly used class action lawsuits against rival companies as a means of surreptitiously obtaining sensitive, privileged information to not only gain a strategic advantage but also increase the competitors' regulatory exposure.[70]

Roche's gambit could serve as a blueprint for foreign adversaries interested in undermining American competition. Even where the foreign government or company does not direct the strategy of the litigation, merely having access to sensitive, confidential information related to the case may provide insights into key aspects of U.S. industries that could provide a foreign government or company political or economic advantages over its U.S. rivals. Indeed, this risk would likely be heightened to the extent the foreign government or company employs portfolio funding—which, as previously discussed, is an increasingly pervasive type of financing. The potential upshot of portfolio funding in this context would be a foreign government bankrolling a multiplicity of lawsuits against targeted companies in sensitive sectors. For example, and of particular concern, a foreign adversary like China could underwrite a portfolio of lawsuits against numerous U.S. companies across a wide swath of critical sectors or even just a single company that necessarily possesses highly sensitive information. In so doing, the foreign government would likely be privy to all of the sensitive pre-litigation

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documents counsel had considered in deciding whether to bring suit in the first place. And to the extent that any of these suits were to advance to discovery, a treasure trove of even more sensitive data would become available to the foreign government, or its agents, which could then be collected and exploited for strategic or even nefarious purposes.

Financing Foreign Influence

Finally, a foreign government could fund litigation in the United States in an attempt to influence domestic U.S. politics and advance its strategic interests. According to the U.S. Federal Bureau of Investigation, U.S. adversaries use foreign influence operations "to spread disinformation, sow discord, and, ultimately, undermine confidence in our democratic institutions and values."[71] Foreign influence operations tactics include using social media platforms to discredit U.S. individuals and institutions.[72] For example, in November 2021, the U.S. Department of the Treasury designated[73] Iranian cyber company Emennet Pasargad and six persons associated with the company pursuant to Executive Order 13848, "Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election," for their alleged roles in attempting to influence the 2020 U.S. presidential election through an online operation designed to intimidate and influence American voters, undermine voter confidence, and sow discord.[74]

Foreign adversaries could use litigation funding as an extension of similar attempts to manipulate U.S. domestic politics through the exploitation of social media platforms. Given the lack of transparency in the TPLF system, there are, unfortunately, few practical barriers in place to prevent foreign adversaries like China, Russia, or Iran from covertly financing politically-charged lawsuits—including those challenging the results of U.S. elections—with the purpose of enflaming passions and exploiting domestic political divisions to advance their strategic interests.

Proposals for Reform

The lack of transparency in litigation funding is troubling for numerous reasons, but it is especially problematic given the significant national security risks described above. The bipartisan, intense national security focus on Chinese, Iranian, and Russian economic espionage, technology theft, and influence operations makes it even more striking that there is a complete legislative and regulatory vacuum in this area, which fails to address foreign adversaries' potential use of TPLF to accomplish their goals.

Until litigants, the courts, the U.S. government, and the U.S. public have clear insight into the nature, extent, and ultimate source of foreign funding of U.S. litigation, we will be unable to understand these risks, much less hope to monitor and mitigate them. Policymakers should consider the near-total secrecy in which TPLF currently operates to be an intolerable weak point in America's national security architecture—one that, if left unaddressed, will continue to give foreign adversaries a means to circumvent U.S. national security protections that exist in other contexts.

Today, numerous U.S. laws and regulations are in place to try to prevent foreign actors from threatening U.S. national security or to bring transparency to foreign influence. For example, foreign adversaries may be restricted from acquiring sensitive U.S. businesses through an approval process managed by the Committee for Foreign Investment in the United States (CFIUS). U.S. export control laws restrict the ability of foreign adversaries to obtain sensitive U.S. technology. The Foreign Agents Registration Act (FARA) requires certain persons acting as agents of foreign principals to register with the U.S. Department of Justice (DOJ) to apprise the American public of efforts of foreign countries or political parties to influence the U.S. government or American public. The Information and Communication Technology rules restrict the use of certain foreign technologies in U.S. networks.

"Policymakers should consider the near-total secrecy in which TPLF currently operates to be an intolerable weak point in America's national security architecture ..."

Finally, U.S. anti-money laundering (AML) laws and regulations have been enhanced in recent years to reduce the risk that foreign actors, including those tied to foreign governments, could exploit the U.S. financial system for illicit ends. The U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN), which administers U.S. AML laws and regulations, has noted that "[i]llicit actors frequently use corporate structures such as shell and front companies to obfuscate their identities and launder their ill-gotten gains through the U.S. financial system."[75] For example, "Russia's unlawful invasion of Ukraine in February 2022 ... underscored that Russian elites, state-owned enterprises, and organized crime, as well as the Government of the Russian Federation, have attempted to use U.S. and non-U.S. shell companies to evade sanctions imposed on Russia."[76] To mitigate these risks, since 2018, FinCEN has required certain financial institutions to collect beneficial ownership information from legal entity customers.[77] This requirement, however, only applies to customers of relevant financial institutions and does not require reporting to the U.S. government.

"While these existing laws and proposals are integral to U.S. national security interests, none specifically addresses how an adversary could use TPLF to accomplish many of the exact same policy objectives that the existing regulations are designed to curb."

To help address these gaps, and pursuant to recent legislation, in September 2022, FinCEN issued beneficial ownership reporting requirements that will require certain U.S. companies to file reports with FinCEN identifying (i) the beneficial owners of the company[78] and (ii) individuals who have filed an application creating the entity or registering it to do business.[79] These new requirements, which will be effective beginning in January 2024, are designed to provide federal law enforcement critical information to combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, including that perpetrated by foreign governments through cut-outs and shell companies, and are similar to those required by more than 30 countries worldwide that have implemented some form of central registry of beneficial ownership information.[80]

Beyond these existing federal statutes, recent legislative proposals contemplate limiting U.S. investments that could enable or enhance the capabilities of U.S. adversaries,[81] curbing foreign malign disinformation,[82] and increasing U.S. competitiveness against China.[83] While these existing laws and proposals are integral to U.S. national security interests, none specifically addresses how an adversary could use TPLF to accomplish many of the exact same policy objectives

“Although national security concerns have not previously been central to these legislative and judicial TPLF-disclosure initiatives, they should be prioritized consistent with other congressional initiatives to address the increasingly imperative threat posed by foreign adversaries like China, Iran, and Russia.”

that the existing regulations are designed to curb. Thus, there is an urgent need to ensure that TPLF cannot be used as an end run by foreign countries to threaten U.S. national economic and security interests.

A National Security Imperative for Existing TPLF-Related Proposals

Several ongoing initiatives offer opportunities to begin to close the national security loophole created by TPLF. Legislatively, the Litigation Funding Transparency Act (LFTA)[84] would require plaintiffs’ attorneys to disclose TPLF agreements in both multidistrict litigation proceedings and federal class action lawsuits. Judicially, a pending proposal to the Federal Advisory Committee on Civil Rules (Advisory Committee), would amend Federal Rule of Civil Procedure 26 to require disclosure of TPLF agreements in all civil cases.[85] A more recent rulemaking proposal that would promote disclosure while the Advisory Committee considers the Rule 26 proposal would amend Federal Rule of Civil Procedure 16(c)(2) to include TPLF as one of the topics for judges and the parties to discuss during pre-trial conferences.[86] These proposals would complement the rules of some individual courts or judges (for example, the U.S. District Court for the District of New Jersey and Chief Judge of the U.S. District Court for the District of Delaware), which require the disclosure of certain TPLF-related information.[87] Although national security concerns have not previously been central to these legislative and judicial TPLF-disclosure initiatives, they should be prioritized consistent with other congressional initiatives to address the increasingly imperative threat posed by foreign adversaries like China, Iran, and Russia.

Moreover, as part of that important exercise, judges and policymakers should recognize some of the limitations of the pending proposals in addressing the particular national and economic security risks discussed throughout this paper. Most notably, although the pending legislative and rulemaking proposals would require the disclosure of the identity of any litigation funder, none would require the disclosure of the ultimate source or sources of the funds used to finance a matter, including possible foreign person investors or limited partners of a TPLF funder. This raises unique concerns for uncovering the potential national security risks discussed throughout this paper. After all, if the entity financing a lawsuit or portfolio of cases is a TPLF company, then merely identifying the name of the company will not provide sufficient insight into the ultimate sources of the funding, including identifying possible foreign influence or interference.

To address this concern, statutory or court-imposed disclosure requirements should also mandate that parties identify the ultimate beneficial owners of the funds that are financing a particular lawsuit. Such disclosure requirements could be modeled after those used in the AML context. Current AML customer due diligence rules, for instance, require certain financial institutions to identify and verify the identity of 25 percent or greater beneficial owners and control persons of their legal entity customers.[88] Similarly, TPLF funders could be required to identify, verify and disclose to the court and other parties any 25 percent or greater beneficial owners of a legal entity investor or limited partner of the TPLF funder and at least one natural person with authority to control the legal entity investor or limited partner.

Imposing similar disclosure requirements in the TPLF context—either through new court rules or congressional action—would provide clear guidance to lawyers and funding parties and would allow for the identification of parties—whether or not foreign—with a substantial enough interest in the litigation to adversely influence the strategy or outcome of the matter.

To the extent that TPLF funders receive foreign government funding, they should be required to report such information not only to the court and other parties but to a relevant U.S. government agency for potential investigation. This could be accomplished through a federal reporting statute specific to TPLF or under existing authorities such as FARA, as discussed in the next section.

Ensuring FARA Addresses the TPLF Risk

FARA offers another path to hamper an adversary's efforts to use TPLF against U.S. national security interests. FARA generally requires a person to register with the DOJ as an agent of a foreign principal and disclose related activities if the person, on behalf of a foreign government or an entity controlled by such government, attempts to influence any member of the U.S. public or a governmental entity to promote the public or political interests of that government.[89] Although there is an exemption for attorneys who provide legal representation in litigation or other formal agency proceedings,[90] there are certain circumstances under which such attorneys may nonetheless be required to register under FARA.[91]

"To the extent that TPLF funders receive foreign government funding, they should be required to report such information not only to the court and other parties but to a relevant U.S. government agency for potential investigation."

“Ongoing FARA legislative and rulemaking reform efforts present a crucial opportunity to address the TPLF national security vacuum.”

Moreover, the attorney exemption does not extend to persons who merely fund or organize the funding of a case.

Ongoing FARA legislative and rulemaking reform efforts present a crucial opportunity to address the TPLF national security vacuum. Since 2017, successive administrations and the DOJ have significantly invigorated enforcement of FARA, and the U.S. Congress pursued legislative changes in both 2019 and 2021.[92] Today, the DOJ is working on potential new FARA regulations for the first time in 30 years. Although reform discussions have largely centered around clarity with respect to FARA exemptions, as well as amendments to the statute's scope and structure to align FARA with its core policy goals,[93] current deliberations should not ignore the important TPLF regulatory gap. With support for FARA reform on the rise, efforts to require similar disclosures regarding foreign funding of U.S. litigation could be easily integrated.

More specifically, FARA should require that any funding of TPLF from a foreign government necessitate the disclosure of the government's role, given the ways in which such litigation can influence U.S. politics and public perceptions.[94] The DOJ has advised that the attorney exemption requires the disclosure of the involvement of a foreign government to the court where the foreign government retained a U.S. law firm to represent not only the government in litigation but also its officials who may be subject to litigation.[95] While this guidance is helpful, FARA regulations should clarify that the attorney exemption does not apply to an attorney who directly or indirectly receives funding from a foreign government where the attorney does not represent the foreign government (for instance, where the attorney represents a litigant who is not the foreign government). Such an attorney should be required to register as an agent under FARA. FARA regulations should also make clear that reporting obligations also apply to third parties, such as TPLF funders, through which attorneys receive litigation funding from foreign governments.

The FARA reporting obligations should apply not only where the foreign principal seeks to advance its political ends. Recent DOJ guidance suggests that a sovereign wealth fund's interest in making money for the government of a foreign country may rise to the level of a reportable public interest.[96] Therefore, an attorney should arguably be required to register under FARA if he or she receives funding from a foreign principal, such as a sovereign wealth fund, even if such money is provided solely for the purpose of profiting from the litigation.

The argument for requiring filing is even stronger where the purpose of the foreign funding is to further nefarious political ends, such as influencing U.S. public opinion.

Near-Term Executive Action

Finally, the Biden administration should consider an executive order to immediately protect against adversaries' use of TPLF. The administration has used existing powers to enhance safeguards designed to protect against the risk to U.S. national security posed by foreign adversaries. For example, President Biden recently issued an executive order articulating key areas of concern that CFIUS should consider in assessing the risk of foreign investments.[97] Notably, the executive order requires CFIUS to consider, in the context of a pending foreign acquisition of a U.S. company, whether "multiple acquisitions or investments in a single sector or in related manufacturing capabilities" may threaten the national security of the United States.[98] In the foreign investment context, publicly available data may allow CFIUS to analyze these sector-wide risks. By contrast, there is a dearth of comparable data regarding foreign investment in U.S. civil litigation, much less identifying the extent of such investment on a sector-by-sector basis.

To remedy this significant information gap and respond to the potential threat arising from TPLF, the president—either as a follow-on to the recent CFIUS executive order or as a standalone order—should require that agents of foreign governments funding litigation against U.S. companies disclose their association with that foreign government. Where such affiliations are unknown, TPLF companies receiving funding should be encouraged to conduct diligence in order to identify possible foreign governments standing behind entity investors or limited partners. The DOJ should be required to investigate instances where failure on the part of a TPLF funder to conduct such diligence results in a controlling interest in litigation by a foreign principal that would otherwise trigger FARA registration. To effectuate the executive order, the president should require that all departments and agencies consider all of the ways in which existing authorities could be leveraged to protect against this national security risk.

"To remedy this significant information gap and respond to the potential threat arising from TPLF, the president ... should require that agents of foreign governments funding litigation against U.S. companies disclose their association with that foreign government."

Conclusion

Executive action would complement the legislative and judicial reforms previously discussed and go a long way toward combating the potential threat to U.S. national security posed by TPLF.

The TPLF industry has experienced unprecedented growth over the last decade, with the U.S. now representing the greatest share of TPLF investment activity. While the industry has largely succeeded in keeping its practices hidden from public view, the limited amount of TPLF agreements that have seen the light of day demonstrate that funders routinely demand the right to control or influence the litigation they finance. Although this reality is problematic in any case, it is all the more troubling if the funder is a foreign person or entity with interests adverse to those of the U.S. Absent legislative or regulatory action, foreign governments will retain the ability to exploit the TPLF loophole to influence or simply finance the growth of litigation in ways that harm U.S. national economic and security interests. Courts, legislatures, and the executive branch should act now to take steps to bring TPLF into the light and expose the unseen influence of foreign actors in the U.S. judicial system.

Endnotes

[1] *See, e.g.*, Robert Huffman & Robert Salcido, *Blowing the Whistle on Qui Tam Suits and Third-Party Litigation Funding: The Case for Disclosure to the Department of Justice*, 50 Pub. Cont. L.J. 343, 344 (2021); Tripp Haston, *The Missing Key To 3rd-Party Litigation Funding*, Law360 (Feb. 7, 2017), https://www.law360.com/articles/888716/the-missing-key-to-3rd-party-litigation-funding.

[2] Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1270 (2011).

[3] *See* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 Iowa L. Rev. 711, 713 (2014); Huffman & Salcido, *supra* note 1, at 344, 350.

[4] Thomas Holzheu et al., *U.S. Litigation Funding and Social Inflation: The Rising Costs of Legal Liability*, at 3, Swiss Re Institute (Dec. 2021) (Swiss Re Report).

[5] *Id.* at 8; *see also* Justin Boes, *Lawyers, Funds, & Money: The Legality of Third-Party Litigation Funding in the United States*, 49 Rutgers L. Rec. 118, 121-22 (2022) ("These funders can be large, publicly-traded entities (like Burford Capital) or private funds (such as Longford Capital)").

[6] *See* Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 Cornell L. Rev. 1133, 1133-34 (2019).

[7] *See* John Beisner, Jessica Miller & Gary Rubin, *Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States*, U.S. Chamber of Commerce Institute for Legal Reform (Oct. 2009).

[8] *See* Huffman & Salcido, *supra* note 1, at 348 (citing Andrew Strickler, *Awash In Cash, Litigation Funders Eager To Strike Deals*, Law360 (Nov. 19, 2019), https://www.law360.com/articles/1220829); *see also, e.g.*, Julie Schindel (Hogan Lovells), *US Litigation Funding Arrangements: Towards Disclosure?*, 76 Int'l Prods. L. Rev. 6, 6 (2019) (noting "exponential growth" of TPLF in the United States).

[9] *See* Ellen Milligan and Katharine Gemmell, *Funds Have Made Lawsuit Bets Into a $39 Billion Sector,* Bloomberg (Nov. 16, 2021), https://www.bloomberglaw.com/bloomberglawnews/private-equity/X1SECTI4000000?bna_news_filter=private-equity#jcite; *see also* Mark Popolizio, *Third-party litigation funding in 2022 – three issues for your radar*, Verisk (Jan. 31, 2022), https://www.verisk.com/insurance/visualize/third-party-litigation-funding-in-2022-----three-issues-for-your-radar/#_edn29 (citing *Considerations from the ABA's Best Practices for Litigation Funding*, The National Law Review, Volume XI, Number 151 (Feb. 16, 2021), https://www.natlawreview.com/article/considerations-aba-s-best-practices-litigation-funding; David H. Levitt & Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, at 1, DRI Center for Law and Public Policy (2018)).

[10] *See* Swiss Re Report, *supra* note 4, at 3.

[11] *Id.* at 8.

[12] Burford Capital, *Burford Capital reports full year 2021 results; record levels of balance sheet deployments* (Mar. 9, 2022), https://www.burfordcapital.com/shareholders/announcements-container/fy-2021-rns/.

[13] Burford Capital, *Burford Capital reports first half 2022 results* (Aug. 9, 2022), https://www.burfordcapital.com/media-room/media-room-container/burford-capital-reports-first-half-2022-results/.

[14] Ralph Sutton, *Five Predictions for Litigation Finance in 2019*, Am. Law (Nov. 27, 2018), https://www.law.com/americanlawyer/2018/11/27/five-predictions-for-litigation-finance-in-2019/.

[15] Maya Steinitz, *The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm*, 63 Wm. & Mary L. Rev. 939, 943 (2022). For example, in 2017, 87 percent of Burford Capital's investment commitments were in the form of a portfolio, whereas only 5 percent of their investment commitments were in single cases. *See* Burford Capital 2017 Annual Report, at 8, https://www.burfordcapital.com/media/1528/bur-28711-annual-report-2017-web.pdf. In 2009, 100 percent of Burford's investments were in single cases. *See id.*

[16] Robert Storace, *Tip for Law Firms: Litigation Funders Prefer Bundled Cases Over Single Suits*, Conn. L. Trib. (Apr. 18, 2019), https://www.law.com/ctlawtribune/2019/04/18/tip-for-law-firms-litigation-funders-prefer-bundled-cases-over-single-suits/.

[17] Steinitz, *The Partnership Mystique*, *supra* note 15, at 978.

[18] *See generally* https://republic.com/apothio.

[19] *See id.*

[20] Dan Roe, *Meme Stocks for Lawsuits? Ryval's Bet on Democratizing Litigation Finance Faces Long Odds*, Am. Law (Sept. 27, 2022), https://www.law.com/americanlawyer/2022/09/27/meme-stocks-for-lawsuits-ryvals-bet-on-democratizing-litigation-finance-faces-long-odds/.

[21] *See* Steven Stradbrooke, *Advice for Kyle Roche, Ava Labs: When you're in a hole, stop digging*, CoinGeek (Aug. 31, 2022), https://coingeek.com/advice-for-kyle-roche-ava-labs-when-youre-in-a-hole-stop-digging/.

[22] LexShares, *Frequently asked questions*, https://www.lexshares.com/faqs ("LexShares FAQs") ("LexShares supports funding by non U.S. based investors through our online platform.").

[23] *Id.* ("LexShares investors include high net worth individuals and institutional investors, including select family offices, hedge funds and asset managers.").

[24] Burford Capital 2021 Annual Report, at 12, https://www.burfordcapital.com/media/2679/fy-2021-report.pdf (Burford 2021 Annual Report).

[25] *See* Swiss Re Report, *supra* note 4, at 6.

[26] *See, e.g.*, Advisory Committee on Civil Rules, Agenda Book, at 220 (Apr. 2-3, 2019) ("[M]ost transferee judges do not report being aware of its use in MDL litigation before them ...."); *id.* at 76 (one judge noting that "[a] number of my colleagues are not even aware that it happens").

[27] Wis. Stat. § 804.01(2)(bg) (2018).

[28] *See* D.N.J. L. Civ. R. 7.1.1, https://www.njd.uscourts.gov/sites/njd/files/completelocalRules.pdf; *see also* Standing Order for all Judges of the Northern District of California, Contents of Joint Case Management Statement, § 19, https://www.cand.uscourts.gov/wp-content/uploads/judges/Standing_Order_All_Judges_11.1.2018.pdf.

[29] Chief Judge Colm F. Connolly of the District of Delaware recently issued a standing order requiring "[a] brief description of the nature of the financial interest" held by any non-party investor in the matters before him. Standing Order Regarding Third-Party Litigation Funding Arrangements, § 1(c), https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf (D. Del. Standing Order).

[30] *See* ABA, *Best Practices for Third-Party Litigation Funding*, at 11, 12, 13, 15 (Aug. 2020), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf.

[31] Burford Capital, *How We Work with Law Firms*, https://www.burfordcapital.com/how-we-work/with-law-firms/ ("We act as passive investors and do not control strategy or settlement decision-making ...").

[32] John H. Beisner, Jessica Davidson Miller & Jordan M. Schwartz, *Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding A Decade Later*, U.S. Chamber of Commerce Institute for Legal Reform (Jan. 2020), at 19, https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf (quoting Bentham IMF, *Code of Best Practices* (Jan. 2017)).

[33] Huffman & Salcido, *supra* note 1, at 357-58 ("[P]ublic information surrounding TPLF arrangements, and the text of agreements that have been disclosed thus far, reveal that funders may in fact influence litigation strategy.").

[34] Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Geo. L.J. 1649, 1650 (2013); *see also* Roger Parloff, *Have You Got a Piece of This Lawsuit?*, FORTUNE (June 28, 2011), https://fortune.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/.

[35] Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012).

[36] *Id.*

[37] *Id.* at 473. Chevron sued the plaintiffs' lead counsel, Steven Donziger, for civil racketeering arising out of the Ecuador litigation, and a federal judge ultimately refused to permit the plaintiffs to collect on their $18 billion judgment, finding that the "decision in the Lago Agrio case was obtained by corrupt means." *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 644 (S.D.N.Y. 2014). Donziger was not only disbarred, but he was also recently found guilty of criminal contempt in connection with his fraudulent litigation scheme. *See* Bob Van Voris, *Chevron Foe Donziger Is Found Guilty of Criminal Contempt*, Bloomberg (July 26, 2021), https://www.bloomberg.com/news/articles/2021-07-26/chevron-challenger-donziger-is-found-guilty-of-criminal-contempt.

[38] Compl. ¶ 35, No. 1:18-cv-12404-ALC, ECF No. 1 (S.D.N.Y. Dec. 31, 2018). The case proceeded to arbitration and remains pending.

[39] *Id.*

[40] *Id.* ¶ 45.

[41] *Id.* ¶ 124.

[42] 771 F. App'x 562, 579 (6th Cir. 2019).

[43] Purchase Agreement § 6.1, *Boling v. Prospect Funding Holdings, LLC*, No. 1:14-cv-00081-GNS-HBB, ECF No. 1-3 (Ex. C to Compl.) (W.D. Ky. filed June 19, 2014) (*Boling* Purchase Agreement); *see generally Boling v. Prospect Funding Holdings, LLC*, No. 1:14-CV-00081-GNS-HBB, 2017 U.S. Dist. LEXIS 48098 (W.D. Ky. Mar. 30, 2017).

[44] *Boling* Purchase Agreement at 1.

[45] *Boling*, 771 F. App'x at 580.

[46] *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 U.S. Dist. LEXIS 103594, at *6 (N.D. Cal. Aug. 5, 2016).

[47] Litigation Funding Agreement §§ 1.1, 10.1, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, ECF No. 186-4 (N.D. Cal. Sept. 16, 2016).

[48] *Id.* § 10.1.

[49] *Id.* § 10.2.4.

[50] Steinitz, *The Partnership Mystique*, *supra* note 15, at 978.

[51] *See id.* at 978-79.

[52] Zeqing Zheng, *The Paper Chase: Fee-Splitting vs. Independent Judgment in Portfolio Litigation Financing of Commercial Litigation*, 34 Geo. J. Legal Ethics 1383, 1398-99 (2021).

[53] Steinitz, *The Partnership Mystique*, *supra* note 15, at 964.

[54] *See* Compl. ¶ 11, *Miller v. Counsel Fin. Servs., LLC (In re Girardi Keese)*, No. 2:20-bk-21022-BR, ECF No. 1333 (Bankr. C.D. Cal. filed Aug. 31, 2022).

[55] *Id.* ¶¶ 8-9, 41.

[56] *Id.* ¶ 41.

[57] *See id.* at Exhibit 3 ("We arranged and Tom agreed to handle all cases ...."); *see also id.* ¶ 10 ("In September 2019, DiNardo personally stepped in and took control of the negotiations regarding the other litigation lenders, which led to various work out arrangements.").

[58] *Id.* ¶ 11.

[59] *See, e.g.*, LexShares FAQs, *supra* note 22; Burford 2021 Annual Report, *supra* note 24.

[60] National Counterintelligence and Security Center, *National Counterintelligence Strategy of the United States of America 2020-2022*, at 2 (Jan. 7, 2020).

[61] Office of the Director of National Intelligence, *Annual Threat Assessment of the U.S. Intelligence Community*, at 6 (Apr. 9, 2021).

[62] Office of the Director of National Intelligence, *Annual Threat Assessment of the U.S. Intelligence Community*, at 12 (Feb. 2022).

[63] Michael B. Mukasey, *Patent Litigation Is a Matter of National Security*, Wall St. J. (Sept. 11, 2022), https://www.wsj.com/articles/patent-litigation-is-a-matter-of-national-security-chips-and-science-act-intellectual-property-theft-lawsuit-technology-scammers-manufacturing-11662912581.

[64] Dick Armey, *Litigation industry is a threat to American innovation, if left unchecked*, Dallas Morning News (Aug. 22, 2022), https://www.dallasnews.com/opinion/commentary/2022/08/22/litigation-industry-is-a-threat-to-american-innovation-if-left-unchecked/.

[65] Lauren Cohn, Umit G. Gurun & Scott Duke Kominers, Harvard Business School, *Patent Trolls: Evidence from Targeted Firms*, Working Paper 15-002, at 31-32 (Apr. 24, 2016), https://unitedforpatentreform.com/files/hbs_patent-troll-study661625037.pdf.

[66] *Id.*

[67] *See id.*

[68] National Counterintelligence and Security Center, *National Counterintelligence Strategy of the United States of America 2020-2022*, at 1 (Jan. 7, 2020); *see also* Office of the Director of National Intelligence, *Annual Threat Assessment of the U.S. Intelligence Community*, at 6-7 (Feb. 2022) ("China will remain the top threat to U.S. technological competitiveness as Beijing targets key sectors and proprietary commercial and military technology from U.S. and allied companies and institutions.").

[69] Steinitz, *Whose Claim is This Anyway?*, *supra* note 2, at 1270.

[70] *See* Stradbrooke, *supra* note 21.

[71] FBI, *Combating Foreign Influence*, https://www.fbi.gov/investigate/counterintelligence/foreign-influence.

[72] *Id.*

[73] When the Department of the Treasury names entities or persons as Specially Designated Nationals (SDNs), the assets of the SDNs are generally blocked, and U.S. persons are generally prohibited from dealing with them.

[74] Press Release, U.S. Department of the Treasury, *Treasury Sanctions Iran Cyber Actors for Attempting to Influence the 2020 U.S. Presidential Election* (Nov. 18, 2021), https://home.treasury.gov/news/press-releases/jy0494. On the same day, the Department of Justice also unsealed indictments of the two employees of Emennet Pasargad. Press Release, U.S. Department of Justice, *Two Iranian Nationals Charged for Cyber-Enabled Disinformation and Threat Campaign Designed to Influence the 2020 U.S. Presidential Election* (Nov. 18, 2021), https://www.justice.gov/opa/pr/two-iranian-nationals-charged-cyber-enabled-disinformation-and-threat-campaign-designed.

[75] Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59,498, 59,498 (Sept. 30, 2022).

[76] *Id.*

[77] 31 C.F.R. § 1010.230 ("Beneficial ownership requirements for legal entity customers.").

[78] A "beneficial owner" is defined as "any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company." 87 Fed. Reg. at 59,594; *see also* 31 U.S.C. § 5336(a)(3)(A).

[79] The beneficial ownership information reporting requirements will be codified at 31 C.F.R. § 1010.380 and implement Section 6403 of the Corporate Transparency Act (CTA), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (NDAA). Section 6403 of the CTA, among other things, amended the Bank Secrecy Act by adding a section 5336, Beneficial Ownership Information Reporting Requirements, to subchapter II of chapter 53 of title 31, United States Code.

[80] 87 Fed. Reg. at 59,499.

[81] America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength Act of 2022, H.R. 4521, 117th Cong. (2022).

[82] Countering Chinese Propaganda Act, S. 429, 117th Cong. (2021-2022).

[83] United States Innovation and Competition Act of 2021, S. 1260, 117th Cong. (2021).

[84] *Third Party Litigation Funding: Buying Trouble Across the Globe*, U.S. Chamber of Commerce Institute for Legal Reform (Apr. 7, 2022), https://instituteforlegalreform.com/third-party-litigation-funding-buying-trouble-across-the-globe/. The LFTA has been referred to the Senate Committee on the Judiciary, the House Committee on the Judiciary and the House Subcommittee on Courts, Intellectual Property, and the Internet.

[85] Popolizio, *supra* note 9. As Senator Chuck Grassley stated, adopting a federal TPLF disclosure rule is "a commonsense matter and critical to the integrity of our federal court system." Advisory Committee on Civil Rules, Agenda Book, at 397 (Oct. 5, 2021).

[86] Lawyers for Civil Justice & U.S. Chamber of Commerce Institute for Legal Reform, *An Important but Rarely Asked Question: Amending Rule 16(c)(2) to Prompt Judges to Consider Inquiring About Financial Interests Created by Third-Party Litigation Funding*, 22-CV-M (Sept. 8, 2022), https://www.uscourts.gov/rules-policies/archives/suggestions/lawyers-civil-justice-and-us-chamber-commerce-institute-legal.

[87] Order, *In re Amendment of Local Civil Rules*, U.S. District Court for the District of New Jersey (June 21, 2021); D.N.J. L. Civ. R. 7.1.1; D. Del. Standing Order, *supra* note 29.

[88] 31 C.F.R. § 1010.230 ("Beneficial ownership requirements for legal entity customers.").

[89] *See* 22 U.S.C. § 611.

[90] *See* 22 U.S.C. § 613(g).

[91] Examples include scenarios where the attorney steps outside the formal litigation or agency process, such as weighing in on related press statements or developing public support for the litigation.

[92] Andy Wright, David Rybicki & Rachel Wofford, *Foreign Agents Registration Act Reform: On the 2022 Agenda?*, Just Security (Feb. 7, 2022), https://www.justsecurity.org/80110/foreign-agents-registration-act-reform-on-the-2022-agenda/.

[93] *Id.*

[94] *Cf.* FARA Frequently Asked Questions, DOJ (FARA "promote[s] transparency with respect to foreign influence within the United States by ensuring that the United States government and the public know the source of certain information from foreign agents intended to influence American public opinion, policy, and laws, thereby facilitating informed evaluation of that information."), https://www.justice.gov/nsd-fara/frequently-asked-questions#2 (last updated Dec. 3, 2020).

[95] *See* DOJ, National Security Division, Advisory Opinion Pursuant to 28 C.F.R. § 5.2 (Feb. 16, 2011), https://www.justice.gov/nsd-fara/page/file/1038241/download.

[96] DOJ, National Security Division, Advisory Opinion Pursuant to 28 C.F.R. § 5.2, (Sept. 18, 2019), https://www.justice.gov/nsd-fara/page/file/1213271/download.

[97] *Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States*" (Sept. 15, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/15/executive-order-on-ensuring-robust-consideration-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/.

[98] *Id.* § 3(ii).

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